hold the surety.[3] The same result should follow when payment is received with knowledge of insolvency, because even so the creditor is unable to determine until after the bankruptcy of his debtor whether he may be allowed to keep the payment so made. Under the Bankruptcy Act of 1898 [4] a preference, even though innocently received, could not be retained by the creditor desiring to prove in bankruptcy;[5] and here giving a defense to the surety after surrender of such a payment worked an especially harsh result. Under the Act as amended in 1903,[6] proof is allowed if a preference, innocently received, is retained. Nevertheless, for the reasons given, the creditor should still have his right against the surety, irrespective of his knowledge of the insolvency.

A more difficult question arises when the creditor, after the adjudication in bankruptcy, refuses to surrender a preference voluntarily, but is later compelled to do so. Here it may with some force be said that the creditor has wilfully endangered the subrogation. It may be, however, that he is in doubt whether the payment can be avoided by the trustee, and desires to test that right in a judicial tribunal. Such a course, which may, if the creditor is successful, enure to the surety's benefit, should not be the means of affording the latter a defense. This result is in accord with the reasoning of the United States Supreme Court, which has held that the surrender of a preference does not have to be voluntary in order to entitle the creditor to prove in bankruptcy.[7] An interesting solution of the general question, suggested in one case, is for the creditor to notify the surety of the facts, and then if the latter does not advise a course to pursue, the creditor may proceed and receive the payment without prejudice.[8] This is a practical rule, but there seems no need to quarrel with the result of the present authority, which, as in the principal case, permits the creditor to take reasonable measures on his own initiative.[9]

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NECESSITY OF NOTICE TO A GUARANTOR OF ACCEPTANCE AND DEFAULT. — How far notice of acceptance and default is necessary in order that the creditor may hold the guarantor is a troublesome question in the law of guaranty upon which the cases are hopelessly irreconcilable. As to notice of acceptance the first inquiry is whether it is always, as some courts hold,[1] an essential element in the formation of the contract of guaranty. A distinction between bilateral and unilateral contracts must be made. In a bilateral contract the consideration for the offer is a counter-promise, which until communicated has no legal effect. Here the notice in the form of an

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3 Petty *v.* Cooke, L. R. 6 Q. B. 790.

4 § 57 *g*.

5 Pirie *v.* Chicago Title & Trust Co., 182 U. S. 438.

6 § 12.

7 Keppel *v.* Tiffin Savings Bank, 197 U. S. 356.

8 Northern Bank of Kentucky *v.* Cooke, 13 Bush (Ky.) 340.

9 Second Nat'l Bank *v.* Prewett, *supra*; Swarts *v.* Fourth Nat'l Bank of St. Louis, 117 Fed. Rep. 1; Watson *v.* Poague, 42 Ia. 582; Harner *v.* Batdorf, 35 Oh. St. 113; Northern Bank of Ky. *v.* Farmers' Nat'l Bank of Cynthiana, 23 Ky. L. Rep. 696. *Contra*, *In re* Ayers, 6 Biss. (U. S.) 48. And see Bartholow *v.* Bean, 18 Wall. (U. S.) 635, 642; *In re* Harpke, 116 Fed. Rep. 295, 298.

1 Davis *v.* Wells, 104 U. S. 159; Winnebago Paper Mills Co. *v.* Travis, 56 Minn. 480.

acceptance is needed to complete the contract. In a unilateral contract, on the other hand, since the consideration for the promise is doing an act, the offer becomes binding at once upon performance of the act requested. Consequently, if giving notice is not one of the things requested to be done, notice need not be given in order to make the offer binding.[2] If notice, unasked for by the guarantor, is required by the law, its nature must be that of a condition subsequent, the breach of which gives the guarantor an option to avoid liability.[3] The English rule is settled that in every unilateral contract of guaranty notice of acceptance is unnecessary.[4] On the other hand, impelled by the analogies of the law merchant and by considerations of fairness to the guarantor, to whom knowledge of acceptance would not in the ordinary case come quickly, by far the greater number of American courts require notice so that he may know of his liability and take steps to protect himself.[5] Since the latter rule is essentially based on considerations of fairness, notice is unnecessary where the equity of the situation would not require it. Hence, if the guarantor has actual knowledge of the acceptance, or if it is fair to charge him therewith, no notice need be given.[6] And, as regards the latter, such was the holding in a recent New York case. *Drucker* v. *Heyl-Dia*, 52 N. Y. Misc. 142. In continuing guaranties all that fairness requires is notice at the beginning and at the close of the account.[7] It is true that some courts undertake to distinguish between an absolute guaranty and an offer to guaranty; but since the so-called absolute guaranty until accepted is no more than an offer to guaranty, this attempted distinction is without foundation.[8] Even in bilateral contracts if the contingency of liability is uncertain and remote, and at the will of some party other than the guarantor, the same reasons of fairness would require notice of performance, in addition to communication of acceptance, as in unilateral contracts.[9]

Notice of default in order to hold the guarantor is by the weight of authority unnecessary.[10] It is, of course, a general principle of suretyship that the creditor owes no affirmative duty to the surety. Some courts, however, distinguish between cases where the time and amount of credit are definite and cases where they are indefinite. In the former contingency notice is not required; in the latter it is;[11] but even then the guarantor is discharged by the failure to notify only to the extent he has been prejudiced thereby.[12] Considerations of fairness justify the distinction made. Though to charge the guarantor at his peril is not objectionable where the time and amount are definite, yet where they are indefinite, since giving notice is a very small matter, involving no more than the mailing of a letter[13] or the like, there is no injustice in imposing this slight burden upon the creditor.[14]

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[2] Wald's Pollock, Contracts, 3 ed., 22.

[3] See Bishop *v.* Eaton, 161 Mass. 496, 500.

[4] Oxley *v.* Young, 2 H. Bl. 613. *Cf.* Mozley *v.* Tinkler, 1 C. M. & R. 692.

[5] Douglass *v.* Reynolds, 7 Pet. (U. S.) 113; Lee *v.* Dick, 10 Pet. (U. S.) 482; Acme Mfg. Co. *v.* Reed, 197 Pa. St. 359. *Contra*, City Nat'l Bank *v.* Phelps, 86 N. Y. 484.

[6] Ford, Eaton & Co. *v.* Harris, 102 Ky. 169; Lowry *v.* Adams, 22 Vt. 160.

[7] Montgomery *v.* Kellog & Sandusky, 43 Miss. 486.

[8] Lachman *v.* Block, 15 So. Rep. (La.) 649; S. C. on rehearing, 47 La. Ann. 505.

[9] See Wildes *v.* Savage, 1 Story (U. S. C. C.) 22, 33; Howe *v.* Nickels, 22 Me. 175.

[10] Heyman *v.* Dooley & Thalheimer, 77 Md. 162; Yancey *v.* Appleton, 3 Sneed (Tenn.) 89.

[11] Taussig *v.* Reid, 145 Ill. 488; Hungerford *v.* O'Brein, 37 Minn. 306.

[12] Brackett *v.* Rich, 23 Minn. 485; March *v.* Putney, 56 N. H. 34.

[13] Bishop *v.* Eaton, *supra.*

[14] See 15 HARV. L. REV. 65.